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10 Attorneys for Defendant
11 EXPERIAN INFORMATION SOLUTIONS, INC.

12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

16 SEAN GILBERT DEVRIES, on behalf of
17 himself and all others similarly situated,

18 Plaintiff,

19 v.

20 EXPERIAN INFORMATION SOLUTIONS,
INC., an Ohio and California corporation,

21 Defendants.

22 Case No. 3:16-cv-02953-WHO

23 **DEFENDANT EXPERIAN**
INFORMATION SOLUTIONS, INC.'S
REPLY MEMORANDUM
REGARDING TAX-REPORTING
DISPUTE

1 **I. INTRODUCTION**

2 On April 23, 2020, the Court issued an order tentatively adopting Plaintiffs' counsel's proposal to
 3 establish a qualified settlement fund ("QSF") under 26 U.S.C. § 468B and 26 C.F.R. § 1.6045-5, in order
 4 to resolve the parties' tax-reporting dispute. (ECF No. 116.) In doing so, however, the Court invited
 5 Experian to submit a reply brief if it disagrees with the proposed QSF settlement structure. (*Id.* at 2:15-
 6 16.) While Experian wants to proceed with the settlement and will comply with the Court's ultimate
 7 ruling, Plaintiffs' counsel's proposed use of a QSF raises substantial concerns and potential liabilities for
 8 Experian. For the reasons explained in more detail below, Experian therefore respectfully objects to
 9 Plaintiffs' counsel's proposal to use a QSF in this context.

10 Specifically, Experian objects to use of a QSF on the following grounds: (1) a QSF settlement
 11 structure is designed for use in a certified class action settlement or multi-district litigation ("MDL")
 12 settlement—indeed, every case cited by Plaintiffs' counsel involves a certified class action settlement
 13 wherein the QSF was used to provide additional time to sort out who is entitled to what—and Experian
 14 knows of no authority that would support the use of a QSF in an individual plaintiff settlement such as
 15 this; (2) the use of a QSF would require Experian to incur additional costs not agreed to as part of the
 16 parties' settlement which is patently unfair to Experian; and (3) based on Experian's research, it seems
 17 likely that the Internal Revenue Service ("IRS") would consider use of a QSF in this scenario as an
 18 improper attempt at an end-run around the current tax regulations, and may very well impart the whole
 19 settlement amount to Plaintiffs¹ under the doctrine of constructive receipt. As a result, Experian may be
 20 deemed in violation of its IRS reporting obligations for failing to issue Form 1099s to Plaintiffs in the full
 21 amount of the settlement, and/or failing to make a backup withholding in connection with the settlement
 22 payment.

23 Accordingly, if the Court is inclined to proceed with ordering use of a QSF, Experian respectfully
 24 requests that the Court order that: (a) Plaintiffs' counsel (Reese LLP; Francis Mailman Soumilas, P.C.;
 25 and Halunen Law) are solely responsible for the creation, tax reporting obligations, and costs associated
 26 with the QSF; (b) Plaintiffs' counsel shall (i) obtain a private letter ruling from the IRS confirming that

27 ¹ Named plaintiff in this action, Plaintiff DeVries, and named plaintiff in a related state-
 28 court action, styled *Chinitz v. Experian Information Solutions, Inc.*, Case No. 17CV025 (Santa
 Cruz Sup. Ct.), Plaintiff Chinitz, are collectively referred to as "Plaintiffs."

1 Experian is required only to issue Form 1099 to the fund, and will have no obligation to issue Form 1099s
 2 to the individual Plaintiffs based on the theory of constructive receipt; and/or (ii) indemnify Experian for
 3 any tax liability or penalties levied as a result of Plaintiffs' counsel's proposed settlement structure and
 4 reporting; and (c) Experian shall not make a backup withholding in connection with the settlement
 5 payment.

6 **II. EXPERIAN'S OBJECTION TO THE USE OF A QSF**

7 **A. THERE IS NO AUTHORITY FOR USE OF A QSF IN THIS CONTEXT**

8 A QSF settlement structure is designed for use in a certified class action settlement or MDL
 9 settlement with multiple potential claimants to provide additional time to sort out who is entitled to
 10 what. *See, e.g., In re Zyprexa Prod. Liab. Litig.*, No. MDL NO. 1596, 2007 WL 2340791, at *1
 11 (E.D.N.Y. Aug. 17, 2007); *see also e.g., In re High-tech Employee Antitrust Litig.*, No. 11-CV-02509-
 12 LHK, 2015 WL 12991307, at *3 (N.D. Cal. Mar. 3, 2015). But those circumstances are not present
 13 here. Indeed, Plaintiff DeVries in this matter and Plaintiff Chinitz in the related state-court action
 14 already know the amount they are to receive under the parties' settlement agreement. (ECF No. 114-1
 15 at ¶ 4.) And Experian knows of no authority that would support the use of a QSF in an individualized
 16 settlement with only one plaintiff in each action, such as this. *See Robert W. Wood, Be Ready for Post-*
Settlement Tax Issues, 45-JUN JTLATRIAL 32, at 36 (June 2009) ("***About the only time you probably
 17 should not use a QSF is in a case with only one plaintiff.***" (emphasis added)). Critically, the IRS has
 18 not authorized use of a QSF in individual settlements or provided guidance regarding how the tax-
 19 reporting of such a settlement structure should proceed when the only beneficiaries of the QSF are the
 20 individual plaintiffs and plaintiffs' counsel. *See id.*

21 Every case cited by Plaintiffs' counsel relates to the use of a QSF in a ***certified class action
 22 settlement.*** (*See ECF No. 115 at 3:4-10.*) That is, each case upon which Plaintiffs' counsel relies
 23 approved of a QSF in a certified class action settlement in which it was anticipated that unnamed class
 24 members would come forward—in addition to the named plaintiff—to recover from the fund such that
 25 additional time was needed to determine who was entitled to what. *See Kress v.
 26 PricewaterhouseCoopers LLP*, No. 2:08-CV-00965-TLN-AC, 2018 WL 1124212, *12 (E.D. Cal. Jan.
 27 9, 2018) ("as consideration to the ***Class Members . . .*** PwC will make the Gross Settlement Payment."
 28

1 (emphasis added)); *see also In re Sony PS3 "Other OS" Litig.*, No. 10-CV-01811-YGR, 2017 WL
 2 5598726, *15 (N.D. Cal. Nov. 21, 2017) ("In full, complete, and final settlement and satisfaction of the
 3 Action and all Released Claims . . . SCEA will pay . . . Valid Claims submitted by **Settlement Class**
 4 **Members.**" (emphasis added)); *see also In re Korean Ramen Antitrust Litig.*, No. C-13-04115-WHO,
 5 2016 WL 8188743, at *1 (N.D. Cal. Aug. 22, 2016) ("Indirect Purchaser Plaintiffs, on behalf of
 6 themselves and the Indirect **Settlement Class Members** and Samyang Foods Co., Ltd. ('Samyang
 7 Korea') entered into a Settlement Agreement . . . to fully and finally resolve the Indirect Settlement
 8 Class's claims against Samyang Korea." (emphasis added)).

9 As such, Plaintiffs' counsel has not identified—and Experian does not know of—any authority
 10 that would support the use of a QSF in an individual settlement, such as this.

11 **B. USE OF A QSF WOULD REQUIRE EXPERIAN TO INCUR ADDITIONAL**
 12 **COSTS NOT CONTEMPLATED BY THE PARTIES' SETTLEMENT**

13 Even if there was authority to support use of a QSF in an individual settlement, it is Experian's
 14 understanding that use of a QSF would require Experian to incur additional costs not agreed to as part of
 15 the parties' settlement agreement. Specifically, if use of a QSF was ordered, tax regulations require
 16 Experian to prepare and submit a "1.468B-3 Statement" to the fund administrator to demonstrate
 17 economic performance. *See* Treas. Reg. 1.468B-3(e)(2); *see also* Matthew L. Garretson, *Mechanics of*
 18 *the creation of a 468B fund*, HANDLING HEALTHCARE LIENS, at § 8:4 (Feb. 2013). This statement
 19 requires Experian to provide certain information regarding the transfer of assets to the fund and incur the
 20 expense—which Experian understands to be in the thousands of dollars—in the statement's preparation.
 21 *See, e.g.*, Garretson, HANDLING HEALTHCARE LIENS, at § 8:4. Experian should not be forced to incur an
 22 additional expense merely because Plaintiffs wish to be issued Form 1099s for some amount other than
 23 the entire settlement amount, in contravention of the IRS reporting requirements.

24 At bottom, it is patently unfair to place additional burden and expense on Experian merely to
 25 facilitate Plaintiffs' counsel's end-run around current tax regulations. There are no aspects of the
 26 parties' settlement—other than Plaintiffs' counsel's desire to avoid clear tax regulations—that warrants
 27 the parties' use of a QSF. Indeed, there is no unknown number of potential plaintiffs that might make a
 28 claim against the fund, and there is no need for additional time to sort out who is entitled to what.

1 Instead, this is an individual settlement with Plaintiff DeVries in this matter and Plaintiff Chinitz in the
 2 related state-court action wherein both recipients have prior knowledge of the amount they will receive
 3 under the settlement agreement per their agreement with Plaintiffs' counsel. (ECF No. 114-1 at ¶ 4.)
 4 Accordingly, there is no need for such a fund to administer a drawn-out settlement claims process, and
 5 requiring the use of a QSF in this circumstance would place an additional cost on Experian for which it
 6 receives no benefit.

7 **C. USE OF A QSF IN THIS CONTEXT LIKELY VIOLATES THE
 8 DOCTRINE OF CONSTRUCTIVE RECEIPT**

9 Based on Experian's research, it seems likely that the IRS would consider use of a QSF in this
 10 scenario as an improper attempt to make an end-run around the current tax regulations. Indeed, thus far,
 11 the IRS has been silent on permitting use of QSFs in individualized settlements. *See* Wood, 45-JUN
 12 JTLATRIAL 32, at 36 ("*the jury is still out on the question of whether it is permissible to have a QSF
 13 [with only one plaintiff], the IRS says it is studying the matter.*" (emphasis added)). And, as such, the
 14 IRS may very well impart the whole settlement amount to Plaintiffs under the doctrine of constructive
 15 receipt. *See* Begley, Jr. & Hook, *Qualified Settlement Trusts, REPRESENTING THE ELDERLY OR*
 16 *DISABLED CLIENT*, 2004 WL 377939, at ¶ 16.05 (May 2019) ("At the present time, there is a question
 17 whether a [designated settlement fund] and a QSF may be used for single-plaintiff cases or whether their
 18 use would constitute 'constructive receipt.'").

19 Here, because the proposed QSF administrator—*i.e.*, Plaintiffs' counsel—is a non-adverse party
 20 to Plaintiffs, and is Plaintiffs' agent, they are not legally independent of Plaintiffs, and Plaintiffs will
 21 have control and thus constructive receipt of the monies within the QSF as soon as Experian pays the
 22 funds to the administrator. *See* 26 C.F.R. § 1.451-2; *see also* Robert W. Wood, *What Lawyers Should
 23 Know About Taxes, Constructive Receipt, and Structured Fees*, BUS. L. TODAY, 2017-FEB Bus. L.
 24 Today 1, at 3 (Feb. 2017) ("lawyers and their clients may *encounter constructive receipt concerns if
 25 they sign legal releases or are otherwise entitled to payments that they then try to delay.*" (emphasis
 26 added)). Given that the parties have already executed a settlement agreement in which Experian agrees
 27 to make a lump sum payment to Plaintiffs by a check made payable to Plaintiffs' counsel, (ECF No.
 28 114-1 at ¶ 4), Plaintiffs' receipt of the funds through counsel is likely to be perceived as not "subject to

1 substantial limitations or restrictions,” 26 C.F.R. § 1.451-2(a), such that Plaintiffs will have
 2 constructively received the entire settlement amount. That is the amount Experian is obligated to report
 3 on Form 1099s to Plaintiffs under governing authority. *See e.g., Johnson v. LPL Fin. Servs.*, 517 F.
 4 Supp. 2d 1231, 1237 (S.D. Cal. 2007). As a result, it is very likely that Experian may be deemed in
 5 violation of its IRS reporting obligations for failing to issue Form 1099s to Plaintiffs for the entire
 6 settlement amount, or to make backup withholding with respect to some portion of the settlement
 7 payment.

8 In the event the Court is inclined to proceed with the QSF settlement structure, Experian’s
 9 concern regarding constructive receipt could be easily remedied by requiring Plaintiffs’ counsel to
 10 obtain a private letter ruling from the IRS, upon which Experian could conclusively rely, confirming
 11 Plaintiffs’ counsel’s understanding of Experian’s tax-reporting obligations in connection with the use of
 12 a QSF in this context. *See Internal Revenue Service, Frequently Asked Questions,*
 13 [https://www.irs.gov/faqs/irs-procedures/code-revenue-procedures-regulations-letter-rulings/code-](https://www.irs.gov/faqs/irs-procedures/code-revenue-procedures-regulations-letter-rulings/code-revenue-procedures-regulations-letter-rulings)
 14 [revenue-procedures-regulations-letter-rulings](https://www.irs.gov/faqs/irs-procedures/regulations-letter-rulings) (Jan. 2, 2020). Alternatively, the Court could order
 15 Plaintiffs’ counsel to indemnify Experian for any liability or penalties levied by the IRS or state taxing
 16 authorities as a result of Plaintiffs’ counsel’s proposed settlement structure and reporting.

17 III. **CONCLUSION**

18 In light of the foregoing risks and potential liabilities that Experian may face as a result of
 19 a QSF being used in this context, Experian requests that the Court decline to order a QSF. In the
 20 alternative, if the Court is inclined to proceed with ordering the use of a QSF, Experian respectfully
 21 requests that the Court’s order include provisions clarifying that: (a) Plaintiffs’ counsel (Reese LLP;
 22 Francis Mailman Soumilas, P.C.; and Halunen Law) are solely responsible for the creation, tax
 23 reporting obligations, and costs associated with the QSF; (b) Plaintiffs’ counsel shall (i) obtain a private
 24 letter ruling from the IRS confirming that Experian is required only to issue a Form 1099 to the fund,
 25 and will have no obligation to issue Form 1099s to the individual Plaintiffs based on the theory of
 26 constructive receipt; and/or (ii) indemnify Experian for any tax liability or penalties levied as a result of
 27 Plaintiffs’ counsel’s proposed settlement structure and reporting; and (c) Experian shall not make a
 28 backup withholding in connection with the settlement payment.

1 Dated: April 29, 2020

Respectfully submitted,

2 By: /s/ Kerry C. Fowler
3 Kerry C. Fowler

4 Attorneys for Defendant
5 EXPERIAN INFORMATION SOLUTIONS, INC.

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1 **PROOF OF SERVICE**

2 I, Angie Contreras, hereby certify that on April 29, 2020, I caused electronic copies of the
3 foregoing document to be served on counsel of record via filing with the Court's ECF
4 system.

5 */s/ Angie Contreras*
6 Angie Contreras

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